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No. 00-

IN THE

Supreme Court of the United States

STEPHEN MICHAEL GREEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

WHETHER THE EIGHTH CIRCUIT ERRED IN CONCLUDING — IN DIRECT CONFLICT WITH DECISIONS OF THE THIRD, FIFTH, AND SEVENTH CIRCUITS — THAT § 3D1.2(b) OF THE UNITED STATES SENTENCING GUIDELINES DOES NOT REQUIRE A COUNT OF REINVESTMENT MONEY LAUNDERING TO BE GROUPED WITH COUNTS OF WIRE FRAUD, WHEN BOTH INVOLVE THE SAME HARM?

II.

WHETHER THE PETITIONER'S SENTENCE OF TWELVE YEARS FOR WIRE FRAUD AND MONEY LAUNDERING PUNISHES PETITIONER DISPROPORTIONATELY, IN VIOLATION OF THE FIFTH, EIGHTH, AND FOURTEENTH AMENDMENTS?

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The petitioner, Stephen Michael Green, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported as *United States v. Green*, 225 F.3d 955 (8th Cir. 2000), and is reprinted as Appendix A to this petition. The transcript of proceedings of the District Court reflecting the District Court's ruling on petitioner's motion to group his money laundering count with his wire fraud counts under § 3D1.2(b) of the Sentencing Guidelines is reprinted as Appendix B. The Second Amended Judgment in a Criminal Case of the District Court finding petitioner's total offense level under the Sentencing Guidelines is reprinted as Appendix C.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on September 13, 2000. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Section 3D1.2(b) of the United States Sentencing Guidelines, which provides that all counts that "involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan" must "be grouped together in a single Group." This case also involves the Eighth Amendment to the United States Constitution, which

provides that "cruel and unusual punishments [shall not be] inflicted"; the Fifth Amendment to the United States Constitution, which provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law"; and the Fourteenth Amendment to the United States Constitution, which provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Between 1991 and 1994, petitioner Stephen Michael Green was involved in his uncle's business of telemarketing distributorships for convertible car tops to auto body shops nationwide. Interested shops paid between $3,000 and $11,000 to become a distributor and were told they would receive a territory, customer referrals, and access to conversion kits. The government claimed that the telemarketing business was fraudulent because it failed to provide promised exclusive territories, customer referrals, customer service support, training and access to the convertible car top kits.

Mr. Green, together with his uncle and his cousin, was indicted on and convicted of one count of conspiracy to commit wire fraud in violation of 18 U.S.C. § 371, fifteen counts of wire fraud in violation of 18 U.S.C. § 1343, and one count of conspiracy to commit "reinvestment" or "promotion" money laundering in violation of 18 U.S.C. § 1956(h). Each count was based on conduct related to the operation of the telemarketing business.

The District Court sentenced Mr. Green in February 1999. (*See* Appendix B.) To determine the sentence, the District Court grouped the wire fraud counts together, but

considered the money laundering count separately. The adjusted offense level for the wire fraud counts was 24, based on § 2F1.1 of the Sentencing Guidelines: a base offense level of six under § 2F1.1; a twelve-level increase based on an amount of loss exceeding $1,500,000 but less than $2,500,000 under § 2F1.1(b)(1)(M); a two-level increase for more than minimal planning and multiple victims under § 2F1.1(b)(2)(A) and (B); a two-level adjustment for role in the offense under § 3B1.1(c); and a two-level increase for obstruction of justice under § 3C1.1. The adjusted offense level for the money laundering count was 31, with a base offense level of 23 under U.S.S.G. § 2S1.1(a)(1), a four-level increase based on a value of funds that exceeded $600,000 but was less than $1,000,000 under § 2S.1.1(b)(2)(E), a two-level increase for role in the offense under § 3B1.1(c), and a two-level increase for obstruction of justice under § 3C1.1.

The District Court then adjusted for multiple counts according to § 3D1.4, taking 31 as the greater adjusted offense level, and increasing the offense level by one. This resulted in a combined adjusted offense level of 32. A criminal history score of I and an offense level of 32 produced a Sentencing Guidelines range of 121-151 months. The District Court overruled Mr. Green's objections to the failure to group the wire fraud and money laundering counts (which grouping would have led to an adjusted offense level of 31 and a range of 108-135 months) and rejected Mr. Green's request for a downward departure, and imposed a sentence of 144 months imprisonment (to be served concurrent to the sentences for the wire fraud counts), three years supervised release, special assessments totaling $850 and restitution in the amount of $1,426,436.95.

Judgment was entered on February 23, 1999. An Amended Judgment was filed on February 24, 1999, and a Second Amended Judgment was filed on March 29, 1999. (*See* Appendix C).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

As noted above, the District Court concluded that Mr. Green's money laundering and wire fraud counts were not to be grouped under § 3D1.2(b). In reaching this conclusion, the District Court held that the two crimes had different victims, stating that specific individuals were victims of the wire fraud and that society was the victim of the money laundering. The District Court so held based on *United States v. O'Kane*, 155 F.3d 969 (8th Cir. 1998), without considering that *O'Kane* involved a conviction for "concealment" money laundering, while petitioner was convicted of "reinvestment" or "promotion" money laundering.

The Eighth Circuit — which had jurisdiction over the appeal under 28 U.S.C. § 1291 — affirmed the District Court's decision. In reaching its conclusion, the Court of Appeals found that its decision in *O'Kane* applied to all types of money laundering, expressly rejecting decisions from the Third, Fifth, and Seventh Circuits holding that the victims of "reinvestment" or "promotion" money laundering are the same as the victims of the underlying fraud. *See United States v. Cusumano*, 943 F.2d 305, 313 (3d Cir. 1991); *United States v. Leonard*, 61 F.3d 1181, 1186 (5th Cir. 1995); *United States v. Emerson*, 128 F.3d 557, 565-66 (7th Cir. 1997). The Eighth Circuit also rejected without comment Mr. Green's argument that his twelve-year sentence for telemarketing fraud was unconstitutionally disproportionate to the severity of the crime.

REASONS FOR GRANTING THE WRIT

The Eighth Circuit — in following decisions of the Second and Eleventh Circuits and rejecting decisions from the Third, Fifth, and Seventh Circuits holding that the victims of reinvestment money laundering are the same as the victims of the underlying fraud — has perpetuated a split in the Circuits over the proper application of U.S.S.G. § 3D1.2 to money laundering convictions. This split results in a sentencing disparity, whereby defendants convicted in the Eighth, Second, and Eleventh Circuits face higher penalties for fraud and reinvestment money laundering than do similarly situated defendants in the Third, Fifth, and Seventh Circuits. Such disparity runs counter to the purpose of the Sentencing Guidelines, and requires review. In addition, applying the Sentencing Guidelines to arrive at a twelve-year sentence for basic telemarketing fraud is unconstitutional — under both the Eighth Amendment and the Fifth and Fourteenth Amendments — as the sentence is grossly disproportionate to the crime.

I.

THE EIGHTH CIRCUIT ERRED WHEN IT FOUND — IN CONFLICT WITH DECISIONS OF THE THIRD, FIFTH, AND SEVENTH CIRCUITS — THAT PETITIONER'S REINVESTMENT MONEY LAUNDERING COUNT NEED NOT HAVE BEEN GROUPED WITH PETITIONER'S WIRE FRAUD COUNTS.

The Eighth Circuit erred in concluding that Mr. Green's money laundering count involved different victims from Mr. Green's wire fraud counts and, therefore, need not have been grouped under U.S.S.G. § 3D1.2, which provides that "all

counts involving substantially the same harm *shall* be grouped together in a single Group." U.S.S.G. § 3D1.2 (emphasis added). Under subsection (b) of the Guideline, counts are defined to have "substantially the same harm" when they "involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan." U.S.S.G. § 3D1.2(b). Counts must be grouped under § 3D1.2(b) if they are related. *See United States v. Emerson*, 128 F.3d 557, 566 (7th Cir. 1997) (vacating and remanding for resentencing based on failure to group related fraud and promotion money laundering counts).

Here, the wire fraud counts on which Mr. Green was charged and convicted involved a scheme to obtain money by means of false and fraudulent pretenses. The transactions at issue in the money laundering count were said to promote that wire fraud through "reinvestment" in or "promotion" of the very same scheme. This case did not involve any counts of "concealment" money laundering; the sole basis for the money laundering allegations was that certain transactions were intended to promote the continuation of the indicted wire fraud. The government itself took the position that the defendants were involved in an integrated scheme to obtain money from auto body shop owners and to use that money to facilitate the continuance of the scheme.

The very nature of "reinvestment" or "promotion" money laundering like that at issue here requires grouping under U.S.S.G. § 3D1.2(b). 18 U.S.C. § 1956(a)(1)(A)(i) proscribes money laundering done "with the intent to promote the carrying on of specified unlawful activity." In other words, the statute requires that the "laundering conduct promote the underlying crime." *O'Kane*, 155 F.3d at 973. In a fraud case

such as this, then, there must be proof of transactions intended to promote the wire fraud scheme. The two acts are thus closely interrelated because "without the fraud there would have been no funds to launder." *See Emerson*, 128 F.3d at 564.

Indeed, the Eighth Circuit acknowledged below that "reinvestment money laundering is clearly more closely related to the underlying fraud than other kinds of money laundering," but nevertheless concluded that "[r]einvestment itself does not make the victim of money laundering the same as the victim of fraud." *United States v. Green*, 225 F.3d 955, 959-60 (8th Cir. 2000); *see also United States v. McClendon*, 195 F.3d 598 (11th Cir. 1999); *United States v. Napoli*, 179 F.3d 1 (2d Cir. 1999). The Eighth Circuit so held based on its conclusion that reinvestment money laundering, like concealment money laundering, "invades society's interest in deterring and detecting crime." *Id.* at 960.

Notably, this premise — that reinvestment money laundering invades society's interest in deterring and detecting crime — is equally true of the underlying wire fraud, reinforcing the conclusion that reinvestment money laundering and the underlying fraud have the same victims. Other appellate courts have so found and held that grouping is appropriate in "reinvestment" money laundering cases. *See, e.g., United States v. Emerson*, 128 F.3d 557, 565-66 (7th Cir. 1997) (district court required to group mail fraud and money laundering convictions where defendant laundered proceeds of mail fraud scheme with intent of promoting that illegal scheme); *United States v. Leonard*, 61 F.3d 1181, 1186 (5th Cir. 1995) (fraud and money laundering constituted "a single, integrated scheme to obtain

money from the victims and to use that money to facilitate the continuance of the scam"); *United States v. Cusumano*, 943 F.2d 305, 313 (3d Cir. 1991) (unlawful kickbacks, embezzlement, conspiracy, Travel Act violations and money laundering were "all part of one overall scheme"); *but see McClendon*, 195 F.3d at 602 (declining to group fraud and money laundering counts); *Napoli*, 179 F.3d at 7-8 (same).

Money reinvested in a fraud scheme contributes to the fraud itself, and the victims of such reinvestment are the same as the victims of the fraud itself. The Eighth Circuit erred in finding otherwise and, in doing so, rejecting the decisions of the Third, Fifth, and Seventh Circuits. Mr. Green respectfully requests that this Court grant a writ of certiorari to resolve this important split among the Circuits and to impose a uniform and fair rule for applying the Sentencing Guidelines to money laundering convictions.

II.

PETITIONER'S TWELVE-YEAR SENTENCE PUNISHES HIM DISPROPORTIONATELY, IN VIOLATION OF THE EIGHTH AMENDMENT AND THE FIFTH AND FOURTEENTH AMENDMENTS.

"[T]he Eighth Amendment prohibits imposition of a sentence that is grossly disproportionate to the severity of the crime." *Rummel v. Estelle*, 445 U.S. 263, 271 (1980); *see also Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991) (plurality) (same). In addition, the Equal Protection Clause of the Fourteenth Amendment, made applicable to federal action through the Fifth Amendment, prohibits criminal sentences that are "based on an arbitrary distinction" rather than "upon a rational sentencing scheme." *United States v.*

McKissick, 204 F.3d 1282, 1300 (10th Cir. 2000). The sentence imposed here violates these Amendments. A twelve-year sentence — of a length typically reserved for serious drug offenders — is grossly excessive punishment for what amounted to nothing more than garden-variety telemarketing fraud. And this sentence, which is more than double the sentence that Mr. Green would have received under the wire fraud guidelines, is inappropriate because the reinvestment money laundering produced no greater harm than the underlying wire fraud.

Indeed, comparing this twelve-year sentence to the sentence that would have been imposed simply for the underlying wire fraud reveals the disproportionate nature of the money laundering guidelines as applied in this case. Under the Sentencing Guidelines, Mr. Green would have faced an imprisonment range of 51 to 63 months had he been sentenced solely for the underlying wire fraud. U.S.S.G. § 2F1.1; Appendices B and C. Adding the money laundering conviction, however, increased his imprisonment range to 121 to 151 months. U.S.S.G. § 2S1.1; Appendices B and C. There is no logical rationale for this increase, which more than doubled Mr. Green's potential sentence under the Sentencing Guidelines.

The money laundering at issue here did not involve drug proceeds, was not part of an organized crime scheme, and was neither sophisticated nor large scale. Rather, the money laundering was merely part and parcel of the underlying wire fraud.[1] While the Eighth Circuit observed that the money

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1. Without question, the money laundering at issue here falls well outside the heartland of crimes that Congress intended to punish

(Cont'd)

laundering "allow[ed] the criminal to increase the number of his fraud victims," this observation alone cannot justify the twelve-year sentence. *Green*, 225 F.2d at 960. Indeed, the Sentencing Guidelines take into account the amount of loss stemming from the underlying fraud in setting the offense level for that crime. To further punish Mr. Green based on the source of the funds that allowed him to continue his telemarketing scheme — particularly when the amount of loss is taken into account on the underlying wire fraud counts and when the victims of the wire fraud and the money laundering are the same — is not warranted, and amounts essentially to forbidden double-counting.

Applying the Sentencing Guidelines to more than double Mr. Green's potential sentence results in an unconstitutionally severe sentence that violates Mr. Green's equal protection rights. Mr. Green's sentence is disproportionate to the crime for which he was convicted and, as such, Mr. Green respectfully requests that this Court grant a writ of certiorari to correct this injustice.

(Cont'd)
when it originally enacted the money laundering statute. Indeed, the money laundering statute was enacted primarily to "counteract the illegal drug trade in this country." *United States v. Caba*, 911 F. Supp. 630, 635 (E.D.N.Y.), *aff'd*, 104 F.3d 354 (2d Cir. 1996). This purpose best explains the "relatively severe base offense level of 23" for money laundering cases brought under Section 1956(a)(1)(A)(i). *Id.* at 635-36 ("The money laundering computations are derived from the guideline's relationship to drug crimes; it is that relationship which drives the high guideline level . . . ."). The federal courts have long recognized that the high sentences associated with money laundering are "intended to reflect the gravity of financial transactions that are independent of serious large scale criminal activity, like drug trafficking or 'mob' extortion." *United States v. Buchanan*, 987 F. Supp. 56, 65 (D. Mass. 1997).

CONCLUSION

The Eighth Circuit erred in rejecting the decisions of the Third, Fifth, and Seventh Circuits and concluding that a reinvestment or promotion money laundering count need not be grouped with underlying wire fraud counts in circumstances such as this case. In addition, the Eighth Circuit erred in rejecting Mr. Green's constitutional challenge to the disproportionate severity of his sentence. Mr. Green respectfully requests that this Court grant a writ of certiorari to address these significant sentencing issues.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED AND FILED SEPTEMBER 13, 2000

**UNITED STATES COURT OF APPEALS,
EIGHTH CIRCUIT.**

No. 99-1788, 99-1973.

UNITED STATES OF AMERICA,

Appellee,

v.

STEPHEN MICHAEL GREEN,

Appellant.

UNITED STATES OF AMERICA,

Appellee,

v.

THOMAS ARTHUR GREEN, SR.,

Appellant.

Submitted: Feb. 15, 2000.
Filed: Sept. 13, 2000.

* * *

Appendix A

Before BEAM and JOHN R. GIBSON, Circuit Judges, and PRATT,[1] District Judge.

PRATT, District J.

As a result of their participation in a telemarketing fraud, appellants were charged by grand jury indictment with one count of conspiracy to commit wire fraud in violation of 18 U.S.C. § 371, fifteen counts of devising and carrying out a scheme to defraud utilizing the wires in violation of 18 U.S.C. § 1343 and 18 U.S.C. § 2, and one count of conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h). A jury found appellants guilty on all counts and found $830,000 subject to forfeiture pursuant to 18 U.S.C. § 982(a)(2)(A). In this consolidated appeal, appellants raise multiple challenges to their convictions and sentences. We have jurisdiction under 28 U.S.C. § 1291. We affirm the judgment of the District Court[2] in all respects.

I.

From 1991 to 1994, Thomas Green, Sr. and his nephew Stephen Green[3] ran a large-scale telemarketing scheme that

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1. The Honorable Robert W. Pratt, United States District Judge for the Southern District of Iowa, sitting by designation.

2. The Honorable James M. Rosenbaum, United States District Judge for the District of Minnesota.

3. Thomas Green, Jr., son of Thomas Green, Sr., was also involved in the scheme but does not appeal his conviction or sentence, which included a downward departure for diminished capacity.

ultimately defrauded more than 480 small business owners of over two million dollars. The scheme was simple. Around this time, major car manufacturers were not building many convertibles. The Greens incorporated a company that purported to be the largest manufacturer of convertible conversion kits in the world. Such kits are used to turn hard-top automobiles into convertibles. The Greens then contacted auto body repair shops throughout the United States, and for a $40 fee, sent out a promotional video and confidential business plan they had produced. The video and plan represented that the company: manufactured and sold convertible conversion kits; was the largest manufacturer of such kits in the world; manufactured over 70 different kits; manufactured kits that were "original equipment manufacturer" quality; had received factory approvals from major manufacturers to install the kits; and would provide exclusive territories to qualified distributors. None of these representations were true.

After a shop owner received the video and plan, the Greens or other company telemarketers called to encourage the owner to send in an application to become a distributor, along with a $150 fee. After the Greens "approved" the application and deposited the fee, owners were called again and encouraged to wire transfer money to the company to secure their territory and to serve as a down payment toward the purchase of conversion kits. During these follow-up telephone calls, the Greens or other company telemarketers said: the company had conversion customers waiting in the area of the proposed distributorship; money had to be wired immediately or the territory would be sold to someone else; and the territory was exclusive. Again, these statements were

not true. The Greens used multiple false names in these telephone conversations and on company documents. The name of the company itself was changed at least four times.

More than 480 auto body shop owners eventually became distributors at a cost ranging from $3,500 to $18,000 each, depending on the number of kits requested. The Greens received over two million dollars, but the company's inventory consisted of only some rusting frames and a few fabric tops. No usable kits were ever shipped. The Greens sold overlapping territories in many states, and no useful customer referrals were made. When owners attempted to contact the company to complain, inquire about a refund, or even simply to request information, they were told further lies.

During the life of this fraudulent telemarketing scheme, seven bank accounts were used by the Greens. The Greens reinvested a significant portion of the proceeds of the fraud into the scheme. They withdrew funds from the accounts, and one account in particular, to pay various expenses, including: production costs for the promotional video, shipping, telephone bills, salaries, intra-corporate transfers, and other office expenses such as rent, taxes, and advertising.

After an investigation and indictment, Thomas negotiated a plea agreement and twice attempted to plead guilty. The District Court twice rejected his plea as without sufficient factual basis. Following a nine-day trial, the jury convicted the Greens on all counts. The District Court sentenced Thomas to 135 months imprisonment and Steven to 144 months imprisonment based on the following offense

level calculation applicable to both appellants. The District Court, after grouping Counts 1 through 16 as closely related counts under Chapter 3, Part D, started with a base offense level of 6 for the wire fraud counts under U.S.S.G. § 2F1.1(a). The District Court then increased the level by 14 for specific offense characteristics, adding 12 levels under section 2F1.1(b)(1)(M) based on the amount of the fraud loss and 2 levels for multiple victims under section 2F1.1(b)(2)(B). To the adjusted offense level of 20 the District Court added 2 levels for role in the offense under section 3B1.1(c) and 2 levels for obstruction of justice under section 3C1.1, for a total offense level of 24 for the wire fraud counts. On Count 17, the money laundering count, the District Court calculated a base offense level of 23 under section 2S1.1(a)(1), increased the level by 4 for the specific offense characteristic of the value of the funds laundered under section 2S1.1(d)(2)(E), added 2 levels under section 3B1.1(c) for role in the offense, and added 2 levels for obstruction of justice under section 3C1.1, for a total offense level of 31. The District Court then combined the fraud group with the money laundering group under section 3D1.4, counting the money laundering group as 1 unit under section 3D1.4(a) and counting the fraud group as one-half unit under section 3D1.4(b), for a total offense level of 32. The District Court departed downward from III to II under section 4A1.3 when determining Thomas' criminal history, and sentenced him to a number of months at the low end of the appropriate range. The District Court departed downward under section 4A1.3 to a criminal history category I for Stephen, and sentenced him to a number of months at the higher end of the appropriate range. The Greens were also each sentenced to three years supervised release,

a special assessment of $850, and ordered to pay restitution, owed jointly and severally, in the amount of $1,426,436.95.

The Greens argue on appeal that the District Court erred in determining their sentences by failing to group the money laundering and fraud counts under U.S.S.G. § 3D1.2(b), and by miscalculating the value of the funds laundered under U.S.S.G. § 2S1.1. Thomas argues separately that the evidence at trial was insufficient to establish fraud, and that the District Court erred by rejecting his guilty pleas, increasing his sentence for obstruction of justice, and increasing his sentence for having an aggravating role in the offense. Steven argues separately that his sentence and the sentencing scheme for money laundering are unconstitutional, and that the District Court erred by finding his crime fell within the heartland for money laundering offenses. We have carefully examined each of the alleged errors and find them to be without merit. We will limit our discussion to the issue of grouping under section 3D1.2(b) of the Guidelines.

II.

When sentencing under the Guidelines, a district court determines the base offense level for each count under the applicable offense guideline in Chapter 2, and then adjusts that level for various factors listed in Chapter 3. See U.S.S.G. § 1B1.1(a), (b), (c). If there are multiple counts, the sentencing court must group closely related counts together to determine a single offense level as directed in Part D of Chapter 3. See U.S.S.G. § 1B1.1(d). The Greens appeal the District Court's failure to group their money laundering and fraud counts under U.S.S.G. § 3D1.2(b). We review the

District Court's application of the Guidelines de novo. See United States v. Lewis, 200 F.3d 1177, 1178 (8th Cir.2000). The District Court also found at each sentencing that the victims of the Greens' fraud and money laundering crimes differed. We review the District Court's findings of fact at sentencing for clear error. See United States v. Johnson, 169 F.3d 1092, 1098 (8th Cir.), cert. denied, — U.S. ——, 120 S.Ct. 143, 145 L.Ed.2d 121 (1999).

Under section 3D1.2 of the Guidelines, all counts involving "substantially the same harm" should be grouped together for purposes of determining the offense level for the crimes. Counts involve substantially the same harm "[w]hen counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan." U.S.S.G. § 3D1.2(b). Therefore, to group counts under section 3D1.2(b), "the court must determine that the same person or entity was the victim of both crimes." United States v. O'Kane, 155 F.3d 969, 972 (8th Cir.1998). In O'Kane, we carefully considered the issue and held that fraud and money laundering counts cannot be grouped under section 3D1.2(b) because those crimes have different victims. See id. at 972-73. The District Court, citing to O'Kane, did not group the Greens' money laundering and fraud counts. The Greens argue that the District Court misinterpreted O'Kane as applying to all kinds of money laundering. They urge us to limit O'Kane to "concealment" money laundering and to follow other circuits which have held that the victims of "reinvestment" or "promotion" money laundering are the same as the victims of the underlying fraud. See United States v. Leonard, 61 F.3d 1181, 1186 (5th Cir.1995); United States

v. Cusumano, 943 F.2d 305, 313 (3d Cir.1991), cert. denied, 502 U.S. 1036, 112 S.Ct. 881, 116 L.Ed.2d 785 (1992); United States v. Emerson, 128 F.3d 557, 565-66 (7th Cir.1997). For the following reasons, we hold the analysis in O'Kane applicable to all types of money laundering.

Concealment money laundering refers to a violation of 18 U.S.C. § 1956(a)(1)(B)(i), which prohibits measures used to conceal or disguise illegal proceeds from detection, while reinvestment money laundering refers to a violation of 18 U.S.C. § 1956(a)(1)(A)(i), which prohibits the reinvestment of illegal proceeds into the unlawful scheme. See United States v. Hildebrand, 152 F.3d 756, 762-63 (8th Cir.1998). We first note that the defendant in O'Kane did not plead guilty to a violation of either concealment or reinvestment money laundering under 18 U.S.C. § 1956, but instead pleaded guilty to a violation of 18 U.S.C. § 1957, engaging in monetary transactions in property derived from unspecified unlawful activity. Neither the language nor analysis of O'Kane distinguishes between these types of money laundering.

O'Kane defrauded his employer of over $300,000 worth of baseball cards and used some of his profit from the sale of those cards to purchase various items for personal use, including a computer and a pickup truck. See O'Kane, 155 F.3d at 970. When examining whether fraud and money laundering have the same victim, we look first to the Guidelines to determine the purpose of the grouping rules. See id. at 972. "The Sentencing Commission intended the grouping rules to 'limit the significance of the formal charging decision and to prevent multiple punishment for

substantially identical offense conduct.' " Id. (quoting U.S.S.G., Ch.3, Pt. D, into. comment.). "Defrauding one's employer is not offense conduct substantially identical to laundering part of the proceeds of that fraud, and the court moved far beyond 'limit[ing] the significance of the . . . charg[e]' by grouping the counts in a manner which punishes O'Kane solely for his money laundering, with no additional punishment for his fraud." Id. (quoting U.S.S.G., Ch.3, Pt. D, into. comment.). Grouping fraud and money laundering counts, therefore, "defeats the express purpose of Part 3D, 'to provide incremental punishment for significant additional criminal conduct.' " Id. (quoting U.S.S.G., Ch.3, Pt. D, into. comment.). This analysis applies equally to reinvestment money laundering as to money laundering under section 1957. If the District Court had grouped the money laundering and fraud counts under section 3D1.2(b), the offense level for the Greens' crimes would have been 31, thereby only punishing the Greens for their money laundering. See U.S.S.G. § 3D1.3(a). As actually calculated by the District Court, however, the total offense level was increased incrementally by only 1 level to reflect the additional harm caused by the fraud.

We also consider the examples listed in the Guidelines to determine whether fraud and money laundering counts are closely related for purposes of grouping. See O'Kane, 155 F.3d at 972. The examples indicate that multiple counts of fraud are properly grouped together. See id. (citing U.S.S.G. § 3D1.2 comment. (n.4)). We stated, however, that "O'Kane's separate offenses are not so closely interrelated as to justify grouping under (b). The offenses entail different kinds of proscribed conduct, punishable on different scales,

which harm distinct and different victims." Id. While reinvestment money laundering is clearly more closely related to the underlying fraud than other kinds of money laundering, the offenses still entail different proscribed conduct, are punishable on different scales, and harm distinct and different victims. And as mentioned above, for counts to be considered closely related under section 3D1.2(b) they must involve the same victim and be part of a common scheme or plan. The counts might seem closely related because the money is being reinvested in the fraud, but that merely satisfies the second requirement of section 3D1.2(b) that the offenses are part of the same scheme or plan. Reinvestment itself does not make the victim of money laundering the same as the victim of fraud, although it certainly allows the criminal to increase the number of his fraud victims.[4] As we observed, O'Kane's use of the truck on occasion to continue his fraud by hauling stolen baseball cards from his employer's premises "does not change the legal conclusion that he harmed a different victim by his money laundering than by his fraud." Id. at 973.

The Greens cite to Leonard, 61 F.3d at 1186, and Cusumano, 943 F.2d at 313, both of which hold that reinvestment money laundering has as its "specific victim" the same victim as the underlying fraud. We have expressly declined to follow these two cases. See O'Kane, 155 F.3d at 972.

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4. Because reinvested proceeds generate further criminal activity, reinvestment money laundering has a higher base offense level than concealment money laundering or money laundering under section 1957. See Hildebrand, 152 F.3d at 763.

> Fraud clearly harms the defrauded. But money laundering harms society's interest in discovering and deterring criminal conduct, because by laundering the proceeds of crime, the criminal vests that money with the appearance of legitimacy. . . . Therefore, we choose to follow those circuits which have held that money laundering invades a distinct societal interest.

Id. at 972-73; see also, United States v. Woods, 159 F.3d 1132, 1136 (8th Cir.1998) (agreeing with O'Kane "that bankruptcy fraud and money laundering invade different interests"). Whether the criminal uses the funds to buy a truck for personal use or to pay for production of a fraudulent video, money laundering invades society's interest in deterring and detecting crime. In both cases the funds have been given the appearance of legitimacy through laundering. We hold the District Court did not err by refusing to group the Greens' reinvestment money laundering counts with the underlying fraud counts. We affirm the District Court's interpretation of the Guidelines and find no clear error as to its factual conclusions.

III.

We have considered all claims of error raised by appellants and, after thorough examination of the record, find them to be without merit. Affirmed.

APPENDIX B — TRANSCRIPT OF SENTENCING PROCEEDINGS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, FOURTH DIVISION DATED FEBRUARY 2, 1999

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Criminal No. 97-159
(JMR/AJB)

United States of America,

Plaintiff,

– v –

Stephen Michael Green,

Defendant.

Sentencing

February 2, 1999

TRANSCRIPT OF PROCEEDINGS

HAD BEFORE THE HONORABLE
JAMES M. ROSENBAUM
Minneapolis, Minnesota

* * *

Appendix B

[2] PROCEEDINGS

THE CLERK: Your Honor, the matter on the calendar is United States of America versus Stephen Green, Criminal Number 97-159. Would counsel please stand and state their appearance?

MS. VANDER VORT: Good afternoon, Your Honor, Alison Vander Vort on behalf of the United States.

THE COURT: Miss Vander Vort.

MR. SHIAH: Good afternoon, judge, Tom Shiah on behalf of Mr. Green, who's seated next to me.

THE COURT: Mr. Shiah, Mr. Green. Counsel, gentlemen, or sir, would you step forward? The matter's before the Court for sentencing; is that correct?

MR. SHIAH: Yes, it is, Your Honor.

THE COURT: All right. And, Mr. Green, have you had a chance to read and review the presentence investigation in this case?

THE DEFENDANT: Yes, I have.

THE COURT: Mr. Shiah, you've had a chance to go over it with your client?

MR. SHIAH: Yes, sir.

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THE COURT: Umm, before we actually begin, I should indicate that I have received a number of letters and submissions on behalf of you and your family, and, ah, read from, oh, clergymen, or clergypeople, I guess, and I also [3] have received a substantial number of victim impact statements filed by various of your victims, so I have all of those things in mind. The large accordion file over here is just part of those, as a matter of fact.

Umm, let me begin by asking, you had objections to certain guidelines. Is there anything you want to say with respect to those?

MR. SHIAH: On the actual calculations, Your Honor?

THE COURT: Yes, sir.

MR. SHIAH: Just briefly. I think it's pretty well framed in the papers that have been filed, but this is a case that involved both a fraud count and then a money laundering count, and I think as I've stated in my position paper, and I've adopted the same arguments that Mr. Tilsen made on behalf of Mr. Thomas Green, I think all defendants would be arguing the application of the guidelines simply stated is that on the fraud count alone, the dollar figure we don't agree with it, and we want you to make a finding as it relates to the money laundering, once again we have a problem with the number. What that number is, I think our estimate would be the actual amount of money that was used to promote, that would be more in the 250 to $300,000 range. You know what number we're at, based on the calculations, and we're also arguing that failure to group [4] those counts has resulted

in a higher number, and that's what I have as far as the calculations of the appropriate offense level. We know what it is. It's a rather high number.

THE COURT: I think that's a fair statement. Anything you want to say in that regard, Miss Vander Vort?

MS. VANDER VORT: Your Honor, I have nothing to add to the papers I submitted to the Court on those factors.

THE COURT: First of all, I note that the presentence investigation sets forth a series of statements about the events which took place. This matter was tried to the Court, and the Court will base its sentencing determinations on the facts which I learned in this courtroom.

Additional information by way of background, of course, is really not disputed in the case. Insofar as there are questions about the events which took place, the statements are sufficient for the purposes of sentencing, and for the purpose of any incarceration which might be imposed.

As to working out the guideline, let me begin, and I'll try and take the objections in order, and I'll set forth my views on those as we go.

The defendant has obviously objected to a number of the guidelines. I'm well aware he contests his guilt because he went to trial, which is his unquestionable right. I do find [5] that he is guilty, and I'll focus that more directly later on. But as to the specific factual statements in the presentence investigation, the defendant has argued that the total loss

calculated particularly for the wire fraud counts, and those are set forth on paragraph 37 of the presentence investigation, overstates the amount and fails to include any deduction, particularly for the convertible car tops which were actually shipped. That objection is close to laughable, based upon the evidence that came forth at trial. There were virtually no convertible tops shipped, if they existed at all. As a matter of fact, the evidence was almost uniform and consistent that the people who did find customers would call and beg and were unsuccessful in obtaining any. But the Court, based on its observation of the entire trial, notes, as I have indicated, that there essentially were no convertible tops shipped, they were unable to establish a defense on their own behalf that hardly anything was shipped at all, and certainly none that would affect the guideline. The calculations were taken, and I think properly so, by totaling the numbers of deposits made by the defendant, or by the victims, and those were made by wire fraud — by wire, which enabled a very exact calculation of the amount of the fraud. Those were sent directly at the defendant's instruction into their bank accounts and that is certainly accurate and sufficient to [6] satisfy the guideline which, as I will note, specifies only, and I quote here, that the loss need not be determined with precision. The Court need only make a reasonable estimate of the loss given the available information.

Interestingly in any fraud, it's the nature of a fraud that it's hard to calculate because things are done in a way that makes it hard to calculate. But here, tabulating the numbers of dollars which were directly submitted by, at the instruction of the defendants, and in contemplation of commentary 8 to Guideline 2F1.1(a), I find that the calculation is accurate, and I'll focus again more directly on the exact amount.

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There's also been an additional objection to the amount under the money laundering, as has been argued by counsel. Here at paragraph 44, ah, it is his argument that the appropriate amount falls somewhere between 200,000 and $350,000 rather than the sum which the Court will adopt that it was in excess of $800,000. Now, this calculation, based on evidence that I heard at trial, and the information that is adduced in the presentence investigation, is entirely sufficient to substantiate the laundering of sums in excess of $800,000. This does not exclude money paid to the defendants as part of the laundering scheme, because in fact it was part of the overall crime scheme. And the Court considers the calculated figure to be, if anything, [7] conservative, but 800,000 will be sufficient. Thus I adopt the presentence investigation's statements of fact for the purposes of sentencing, but as I've indicated in particular, the sentence will be imposed directly on my own observations.

There were additional objections. The defendant objected to a number of the specific findings. He objected to that finding, those which I've already referred to. The defendant has objected on the question of obstruction of justice. He argues that the probation office has mischaracterized his testimony at trial as being false, and there he focused directly on paragraphs 26 through 29, 41 and 47. His views are rejected by this Court.

The defendant testified and continued to tell ridiculous stories that were entirely unsupportable, and unsupported. They only appeared to be willing and interested in kind of continuing to perpetrate this, oh, we just didn't, we're going along, the contract that they signed never really provided

for them to make, to have anything rushed. These were efforts to obscure the facts in the case, and, ah, most patently false of all of his statements was that they did not attempt to sell overlapping territories. And they did so repeatedly, whether they were defined by geographical region, whether they were defined by community, whether they were defined by zip code or by area code, they sold them [8] overlapping in each case. Those are false statements, and they are entitled to a two-point enhancement for obstruction of justice within the contemplation of 3C1.1.

As to acceptance of responsibility, it is now his argument that he ought to have a reduction based upon that, under 3E1.1. In those regards, he disagrees with the statements set forth at paragraphs 30 and 32, and paragraph 55. He now indicates that he's sorry that people lost money, and while he might have over sold to some extent, ah, he has participated actively in the preparation of the presentence investigation. This Court has on many occasions and happily granted acceptance of responsibility, even though, even over the government's objections when people have gone to trial. In this case I see no indication whatsoever of an affirmative acceptance of his personal responsibility for the evil and the pain that he and his colleagues have inflicted. Under those circumstances, ah, it appears to me that he does not fall within the category of those who would be granted acceptance of responsibility, and that'll be denied.

The defendant has urged a departure, or has urged that there not be an enhancement for more than minimal planning. This is an enhancement under 2F1.1(b)(2)(A). Now, this provision provides for the enhancement if the defendant

either engaged in more than minimal planning or, two, [9] participated in a scheme to defraud more than one victim. He easily satisfies both categories. The extent of efforts to sell these, ah, these claimed distributorships and service arrangements show that he was in an ongoing and a continuing effort, the numbers of victims are huge, he turned and glanced again at the, I don't know, 60, 70, 80 people, directly, and they only a small part of the number of his victims. So he falls within that category that would be granted and given an additional two points, and those have been awarded.

Now, offense grouping, counsel has made the argument they are closely related and under 3D1.2(b) they should be interrelated and there should, that there's kind of a double count element I think is really the short version of it. And here, however, the argument is in fact precluded by United States versus O'Cain at 155 F.3d 969, that's the Eighth Circuit, 1998. In that case there was a rather similar case where mail fraud and money laundering were both involved, and the Court noted, quote, to group the two counts under 2D — or 3D1 2(b), properly, the Court must determine that the same person or entity was the victim of both crimes. I reference page 972. There, as here, the crimes' victims differ. The specific victims of the wire fraud were the individuals. In the view of the courts, society was the victim of the money laundering. Therefore, [10] there are differing defendant — differing victims, and the grouping is inappropriate. The Court declines to grant a grouping exception.

As to his role as a manager, at paragraphs 40 and 46, the presentence investigation had indicated that the defendant

was a manager within the contemplation of 3B1.1(c). It is his argument that he was merely a follower, doing as has been directed by his uncle. The evidence at trial is clear that he was not. His uncle may have set this up, his uncle may have set up parts of it, but he became the operational management on-site, and he directed the enterprise. He wrote and distributed a number of the sales pitches that were used, and people turned to him and came to him. Under those circumstances — and those people were under his direction. Therefore, this Court finds that he was in fact the supervisor and the manager of this plan, and significantly controlled the day-to-day operations of this company, a large number of whom were doing nothing but selling distributorships, and therefore, it is appropriate to put that enhancement in.

Therefore, I work out the money, or the total offense levels, it's the defendant's argument that it ought to be at level 23, that the 23 which is established at, or suggested at paragraph 43 is in error. He was convicted under a conspiracy to violate 28 United States Code Section [11] 956(a)(1), ah, which it in his view under 2S1.1(a)(1) would carry a 2. Now I'm going to tell you the calculation that I have worked out. In this case there is no grouping, as I've indicated, the guidelines are calculated then for each and combined under 3D1.4 under wire fraud, that's Counts 1 through 16, there's a total offense level of 24, a base level of 6, 2F1.1(a), that's for wire fraud under the statute, 12 points are added for the specific offense characteristics, the overall loss is more than 1.5 million, but less than 2.5 million, that's 2F1.1(b)(1)(M), two points are added for specific offense characteristics, that's under 2F1.1(b)(2)(B), that's a scheme to defraud more than a single victim, adding two more points for his role in

the offense as a manager under 3B1.1(c), and two points more are added under 3C1.1 for obstruction of justice in the form of perjury given during the trial, and I wind up with a 24.

Under money laundering, the total offense level is 31. A base offense level of 23, under 2S1.1(a)(1), that's laundering of money, monetary instruments under the statute, four points added under 2S1.1(b)(2)(E). The value of the funds exceeded 600,000, but was less than 1 million. That's, and I found here that the total was something at least $813,209.38. Two points are added for role in the offense as manager under 3B1.1(c). And obstruction as I've indicated above these then are calculated or looked at [12] together as I've indicated in contemplation of O'Cain, and the larger by far is the money laundering at 31, the counts, which basically becomes the driver, you add one and a half units because they, under the money laundering count, which is the 31, the wire fraud is at 24, that's seven less, you add one and a half, ah, under that you add the one and a half and you come up with a grand total here of 32, which is the calculation number.

Now, the criminal history is a category three for four criminal history points. This case the Court disregards the prior criminal history. It is automotive, and this case has nothing to do with either driving or drinking. And under those circumstances, it is appropriate for this Court to depart under 4A1.3. The prior criminal history would significantly overrate his prior criminal history, which was in fact two drunk driving related counts, and the fact that he was on probation for them is not going to be considered to his

detriment in this sentencing, and he is going to be sentenced as if he were a category 1.

There is then a presumptive guideline sentence of 121 to 151 months, a term of supervised release of two to three years. Under the statute I may impose a term of supervised release, the range again is two to three years. There is a substantial dollar fine. The defendant is incapable of paying the fine because I'm going to order him to pay [13] restitution. I can note, however, that under 18 United States Code 1956(h) I could double the amount of the fine in the amount, I could make his fine for money laundering double the amount of money that I find that he took, that would put me at 1.6 million, but I've told you if there was ever any money here it would go back to the victims. There's a special assessment of $850. That's $50 on each of the counts on which he's been convicted.

The defendant has moved for a downward departure. In his view this case and his sentence would fall outside the heartland for money laundering, and in this Court's view it would not. It appears to this Court that, quote, the guideline provides for substantial punishment, again quoting, in keeping with the clear intent of the legislation, and under that commentary 2S1.1, the Guidelines provide for a higher level in cases precisely like this because the defendant, quote, encouraged or facilitated the commission of further crimes, and these are the mail frauds which are involved here. This is Congress's policy, as set forth in the sentencing guidelines and they are adopted.

Finally, the defendant has argued for a downward departure claiming this was a single act of aberrant behavior.

This is even more laughable. This kind of an operation going on for months and months and months involving many, many, many victims is not a single act. [14] This is not like a shoplift one day for a person with a clean criminal record, and that does not apply.

Now then, having set the Guidelines, counsel, is there anything you want to say before I impose sentence?

MR. SHIAH: Assuming that those are the numbers that we're dealing with and if I understand what the Court has said, you've rejected all motions for a downward departure, am I right?

THE COURT: Got it.

MR. SHIAH: So we're in a box, you say some things are laughable, and I want to say something on the record in the context that oftentimes I as the attorney make arguments on behalf of my client, I don't want you to take it against Mr. Green personally, which I know you haven't, but I just want him to be aware of that that even though I pursue avenues that may be rejected by this court, I do that especially in this case noting the money laundering and the fraud, I do think there is a good argument there that you have rejected and someone else can take a look at that.

THE COURT: I want to make it clear, when I say they're laughable, in light of the evidence, and I tried to indicate the evidence that I found completely in conflict with the position, but the next part of it, which is extremely important in a way that it'll be difficult for you to believe perhaps at this

moment, Mr. Green, you are well {15} represented by a zealous lawyer who has argued strongly on your position, and he may argue as strongly as he likes, and some arguments I will accept with his suggestion, and some I will reject, but I don't find them trivial in any circumstance, but I'm not going to dispute what I know from the facts with an argument that I think does not have substance. Counsel, you may proceed.

MR. SHIAH: Thank you, judge. Bottom line is this, we're at this box. I'll tell you right now, I don't think it's appropriate for this particular crime, but I know that we're dealing with guidelines and you've made your finding. To the extent you have any leverage within that box, I think it's making the blatant obvious by saying, judge, look, I think in this particular case, even with the findings you've made, we should be at the bottom of that particular box. You have had an opportunity to learn a little bit more about Mr. Green. What happened was a while ago. It was a significant period of time, and his life has changed since then. I think the Court is aware of this. It was reflected in the decisions you made to allow him to travel to pursue his active religion, so I think the bottom line is here, on behalf of Mr. Green, I want you to go to the bottom of the box that you deem applicable.

THE COURT: I thank you, sir. Counsel, is there anyone other than your client that you'd like to have heard [16] in allocution? I've indicated, of course, I've read the letters, and I'm familiar with the content of those.

MR. SHIAH: No, sir.

Appendix B

THE COURT: Stephen Michael Green, I address you directly, is there anything you want to say before I impose sentence in this case?

THE DEFENDANT: Well, Your Honor, I don't exactly know exactly what to say. I do agree with you that I think I have been more than admirably represented in this trial, and I guess I'd like to thank Mr. Shiah personally in front of his peers for making an absolutely unbearable situation somewhat more bearable.

I guess, umm, for whatever it's worth, for the prosecution, I genuinely bear you no ill will. I think you're wrong, but, umm, I understand what duty is, and I know that they've upheld their duty to the best of their ability.

And lastly for yourself, Your Honor, I, ah, during the course of the trial I felt that we had a fair trial. I did not feel like we had adequate means to prepare, and I think you've gotten a — I won't be disingenuous or dishonorable and tell you that I'm guilty, or I admit any guilt whatsoever, but I will say that again, to be redundant, you've gotten a very lopsided view of what we were all about. And though it is true that my loyalty and my talents [17] were placed in an endeavor not worthy of them, and it is also true that I placed my trust in circumstances and individuals that obviously weren't worthy of them, having said that, I do in fact take full responsibility for everything that I've done. I did, as a matter of fact, and the record will bear out, at no time ever refuse to answer questions. I genuinely felt like, umm, we had a business, and we worked the business. It would — again, I — my intent was never to lie to this Court. And my

intent was never to lie to those people. My intent was never to steal from those people. And I can honestly say that I've, you know, in 1992, 1993, I had a very, umm, a very dramatic change of life through a number of different circumstances. And I had a decision to make to stay with that company and stay with my family or to leave, and I made a decision to try to make it better from the inside out, and that has all been characterized as attempts to perpetrate the scam and it's been laughable that we had a school and that we tried to do different things for these people. It was much too little much too late.

I have no desire whatsoever to go to prison. I don't mind, ah, going as a visitor, maybe as a traveling minister, but, umm, if that's the price that I have to pay then I do so. That's fine.

Umm, the only other thing that I'll say is that I know [18] that the things that I were, was involved in, and the things that I did were in fact wrong, and I do not conduct my business in such a fashion today, nor had I, umm, from the time that I left that company. We treated people poorly, we did bad things. But I did, I did make a quality decision to try to live each and every day of my life as atonement for that.

THE COURT: Have you paid anybody anything back? A dollar?

THE DEFENDANT: I didn't know who to pay, Your Honor. I —

THE COURT: Did you make an inquiry?

THE DEFENDANT: Well, again, Your Honor, until the charges, until we were indicted I had no idea that anything that we had ever done —

THE COURT: Then why did you decide to change your life?

THE DEFENDANT: The reason I decided to change my life was because in 1992 and 1993 I became, and I, again this is just —

THE COURT: No, no, what I mean is, I'm not talking about a religious conversion, but if your life was one way, and you decided it had to be changed, you must have thought there was some difference or something wrong with the previous form of life.

[19] THE DEFENDANT: Well, that's correct, I did, as a matter of fact.

THE COURT: And did you take any step to give a nickel to as many as one of your victims?

THE DEFENDANT: Are you — please forgive me, are you referring to during the course of the business?

THE COURT: From that day until this.

THE DEFENDANT: From the day that I had a change of heart, yes, as a matter of fact I did.

THE COURT: I thought you told me you didn't know where to go.

THE DEFENDANT: No, I meant after I left the company. As a matter of fact I did. As a matter of fact, and I don't know, you know, I can — I was told that during the course of the trial some of the witnesses against us were told that we had paid our references to give good references. In other words, when we signed up a distributor they got references. We gave out, well, Moses Autobody was one, and there were several others, and I was told that we had paid those references, we'd bribed them to give a good report. And that's simply a lie. They were paid for co-op and reimbursement, they were paid for travel to and from the facility in Vegas. I mean, in the course of the program I was paid commission on kit sales, not on distributor sales. There's a real — a real — it was always my intent to sell [20] more kits and, yeah, I know, it doesn't seem like we had kits, I guess we could have built a car here in the courtroom, you know? As a matter of fact I could probably do that at my shop today and maybe someone would believe me that we could actually do that, and that we actually did that. I don't, I don't know how to answer those objections, I really don't. Umm, we did not have the money, we didn't have the resources. It seemed, or maybe just the will, I don't know. I don't know exactly where all this went south. What I do know is I did feel badly about the way people were treated and I did try to make the program better from the inside out.

Now, every time that I've ever said anything like that it's been shoved down my throat and they've told me that I'm lying. I was a Boy Scout before I was a Marine and

when I was a Marine, the motto of the Marine Corps is Sempre Fidelis which is honor always. I would rather tear out my tongue than lie to you. It's antithetical to who I am. It's not what I do. Now, I walked some pretty tight margins with these distributors, yeah, I did, and it's possible, it's possible I even crossed the line. As a matter of fact, from where you sit, it's highly likely. Or maybe it's a fact. But I — as God as my witness I never intended to steal from those people. I really didn't. And I, for my involvement in the program, for everything that I did, for [21] the responsibility that I took, you know, it's only my wife and children that pay the price. I haven't had a vacation in 13 years. You know, it's —

The only other thing I'd say is, you know, six blocks from here I ran a food shelf for over a year, and I shipped humanitarian aid all over the world, and I went to Russia, and we hand delivered medicine to children, and, you know, I've given away more money in the last three years than I made in the entire time that I worked with that company. I did that as atonement. I know that what I did was wrong. I never, I never believed that it was criminally wrong. I'm shocked and amazed to find that out. And quite frankly, I think if you had a complete picture of what went on in that company, you would know that yourself. We weren't able to prove that. There was too much water under the dam, too many victims, too many people gone to and told that we stole their money.

Now, I don't know about you, but any time that anybody's ever come to me after I lost money and told me that I got bilked I was really ticked off. You know. I think

that's where a lot of this comes from. So now that I've dug myself a deeper hole, umm and shot my mouth off, I'm sorry, I beg your forgiveness. I throw myself on the mercy of the Court. Umm, I'll just do whatever I need to do to pay this debt. And I'll continue on. I can never do anything good [22] enough to erase the past.

THE COURT: Anything else?

THE DEFENDANT: No.

THE COURT: Miss Vander Vort, anything you want to say before I impose sentence in this case?

MS. VANDER VORT: Your Honor, before I say anything, there is one individual here who did want to speak on behalf of the victims.

THE COURT: You may. Good afternoon, sir, would you be good enough to tell me your name, please.

A VOICE: I'm Thomas Reese. I live in Mound, Minnesota?

THE COURT: Mr. Reese? I'm sorry?

MR. REESE: I live in Mound, Minnesota. One of the victims, William G. Mormon is one of the victims. He's in Colorado, he could not be here.

THE COURT: Where in Colorado?

MR. REESE: Aspen.

THE COURT: He's the one who had the place called Columbine.

MR. REESE: Yes, exactly.

THE COURT: What happened to your son's business?

MR. REESE: I was about to tell you that.

THE COURT: Why don't you.

MR. REESE: Okay. Bill Mormon is a simple man and [23] not a very successful one. But he's good hearted, and he always wanted to have a business of his own. And he had started this Columbine Body 1407, he's an excellent body person, but not a great businessman. And a wonderful father, he has four kids from seven to 17. But he was just making it in the body shop. Just making it. And this opportunity came up, and he was all excited about it. And, ah, he called me on it, and I discouraged him a little because it didn't sound, but that was his business, and I stay out of it. But this was the dream of his life, to have his own business, and this seemed like this opportunity would give him the extra income that he could stay in the black and make it. Unfortunately, it went the other way. It took him down, and it so destroyed his self-esteem that he hasn't really had a good job since.

And there are other reasons, of course, but, you know, this was his dream and it's gone. And he's not a great recordkeeper, but he kept good records on this. He gave me

his folder. I was impressed that he did that because it must have hurt him deeply, and because it was an important thing in his life, and his loss was not super great as I suppose in regard, in relation to the other monies I'm hearing here, but it, I just wanted to portray in some small way what it did to one family, one person. And I don't know if he'll ever have another business of his own, he's just so [24] disheartened about it now. Thank you, Your Honor,

THE COURT: Thank you, sir.

MR. REESE: Any questions?

THE COURT: No, sir.

MS. VANDER VORT: As Your Honor has noted and I think as Your Honor maybe even knows better than I do now there were over 300 victims of this fraud. That one story, I suspect, could be repeated in 385 cases and Your Honor has indicated that he's read 70 or 80 such stories. There was overwhelming evidence in this case that these defendants intended every single consequence of their conduct. That they intended to steal money from these individuals, that they did so with no conscience, no remorse, and no attempt to this day to atone for that in any way whatsoever. This Court didn't get a lopsided view. Those victims didn't get a lopsided view. It was clear, intentional, wrongful, conduct. It's the position of the United States that the defendant should be sentenced at the high end of the guideline range.

THE COURT: Thank you, counsel.

MS. VANDER VORT: Thank you.

THE COURT: Mr. Green, you do not have to believe that you were a criminal or perpetrating a crime. You can believe anything you like. The incontrovertible evidence is what you did was wretched, it was evil, and it was illegal, [25] straight up. You are just a thief. You made a closing part of your statement, and I want to respond to it. You may choose to lie to yourself, and that's your privilege, you can't lie to me, I know the facts. But you said enough people told these people that they had been victims of a scam, suggesting that that led them to believe it. The correlative of that is it must have been the government who told them they were victims of the scam, maybe the Bureau or postal authorities or perhaps Miss Vander Vort. You may try and sell that somewhere else, you've been a successful salesman in the past, but that's ridiculous, and you know it's ridiculous. People called you and your place countless times. Asking for their money back. And when they didn't get the money back that had been promised them, and I know about your reading of the contract, but people who said, oh, there's a guy down the street who said who's got the same deal that I do, and I was told I'd have an exclusive. They didn't need anybody to tell them that they had been a victim of a scam. They were a victim of the scam. You were the scam. And they knew it, believe me, long before the postal authorities, and long before Ms. Vander Vort, and long before any federal agency.

You said your life has changed, and there's nothing like a person who loves humanity and cares nothing for individuals. Nothing, not a farthing, has gone back to your

[26] victims. And you stand here and hold yourself up as someone who's found a new situation because you've given away more than you ever took. Not to your victims. But only to those to whom your heart goes out. The people that you hurt are the people to whom you have given nothing. In there, heartbreakingly in there, from the words of the father of another of your victims, it's interesting, I don't know why it stuck in my mind, I even remember the person, he wrote this, the victim wrote, I remembered the name of the place because I've been to Aspen and the name Columbine of course is the flower out there, they wrote to me of their loss of their reputation, these were small business people. They wrote to me of the loss of respect in the communities in which they live, and everybody knows body shop guys are not much, you know, because they steal your money. These are people who worked real hard, and a loss of three or four thousand dollars, which might to a person who's taking the kind of money you took not be much is a huge amount. One of them wrote and said for me to lose $3,600 I had to take in 36,000. Basically made one percent, or made 10 percent net net at the end. That's what it cost him, but that's almost a year's income for some of these folks. These are marginal producers in tight situations, many of them just making it. Marriages have been lost, businesses have been lost, bankruptcies have been declared, reputations have been lost, [27] things have been repossessed that were put up as collateral to participate in your deal. And that's what is the wreckage left behind the runaway freight train of your business.

You are absolutely correct, your wife and your children will pay the price. You will be fed, clothed, sheltered, and

given a hundred percent medical care. And that will be yours. Your wife and anyone else will have to fend for themselves as a direct result of your own actions.

I tell you, Stephen Michael Green, that you were charged in Count 1 of an indictment with conspiracy to commit wire fraud in violation of 18 United States Code Section 371. In Counts 2 through 16 with aiding and abetting wire fraud in violation of 18 United States Code Section 1343 and 2. And in Count 17 of conspiracy to commit money laundering in violation of 18 United States Code Section 1956(h). Based upon the jury's verdict of guilty on each of those counts, it is considered and adjudged that you are guilty of each and all of those offenses. It is therefore adjudged that you are committed to the custody of the Bureau of Prisons or imprisonment for a term of 144 months. That term will consist of 45 months to be served concurrently on Counts 1 through 5, 45 months to be served concurrently on Counts 6 through 10, said time to be served consecutively to that time which was served on Counts 1 through 5, and 54 months [28] to be served concurrently on Counts — 11 through 16, to be served consecutively to that time previously imposed on the prior counts. Aggregating in total 144. They are grouped and arranged as I have in concurrence with Section 5G1.2(d) of the guidelines.

At the end of the service of your confinement, it is ordered that you serve a term of supervised release. That being of three years' duration. During which time it is ordered and directed that you comply with state, federal, and local laws, comply with the rules and regulations of the probation office — I think I may have misspoken, and I want to make

it clear. 144 months on Count 17. If I misspoke, I didn't mean to do so.

That you comply with the rules and regulations of the probation office, abide by the standard conditions of supervised release as recommended by the Sentencing Commission, you may not possess a firearm or a dangerous weapon, you will submit to such drug testing or after care as may be recommended. Sir, you may not incur an additional charge or an additional line of credit or open an additional line of credit without the prior written approval of your probation officer. And the probation officer will give you a copy of each and all of these statements. You need to understand that after you get done doing the time which you [29] will serve in custody, you owe this additional time, and I give you my word, sir, as I'm sitting here I will take every second of it, if you mess up. Clear enough?

THE DEFENDANT: Yes.

THE COURT: Sir? It is ordered also that you pay a special assessment in the amount of $850. It is unfortunate, but required by law, that you pay that first. That goes to the victims of crime as directed by Congress. I do not impose a fine, and the reason it's unfortunate is because every farthing you make ought to go back to your victims, but I will order restitution once you have satisfied your obligation to the government, and there you are obligated to pay the sum of $1,400,000, which sum is due forthwith to the victims of your crime and that'll be set forth in Appendix A — that is set forth in Appendix A of your presentence investigation where each of them is identified and listed, and the allocate

portions will be distributed among them and that will be also this joint obligation of each of your colleagues. Payments will be directed to the office of the United States District Court.

You are not presently in custody. What is your pleasure with respect to voluntary surrender, counsel?

MR. SHIAH: We would request voluntary surrender. You're familiar with the history. I know he stands not only convicted now but sentenced, but this goes back to '93. [30] He's been around, I don't think he's going anywhere, and given his activities since then, for whatever motivation, I don't believe that he presents a clear and present danger to anybody at this particular time, judge.

THE COURT: Miss Vander Vort?

MS. VANDER VORT: Your Honor, in light of the fact that Mr. Green has traveled during the time that he's been out on bond and has rushed to the jurisdiction I don't see any reason to change his custody status.

THE COURT: Sir, you are ordered into custody forthwith. Time is up. After five and a half years it's time you begin to pay the price. I can assure you there are many victims who have been long waiting for this to occur.

You have a right to appeal from the sentence and in fact from your conviction, and you must do so within ten days as prescribed by Rule 4 of the Federal Rules of Appellate Procedure. You have a good lawyer, and he will represent

you, and he will place that appeal if you direct him to do so. If you fail to so instruct him, you will have waived your right to appeal, but I want to make it clear to you have to tell him to do it.

Now, the government also has a right to appeal, and if the prosecutor wishes to do so, and you need a lawyer to defend you, and you are unable to defend yourself, a lawyer will be appointed at no cost for you.

[31] The range which is set forth is a broad one. It goes beyond 24 months. I have sentenced you at a middle high area in that range. Sir, you have broken heavens knows how many laws, and you have destroyed heavens knows how many lives in the process. The net result is, I believe that the sentence which I have imposed recognizes the wrongs which you have committed and the fact, as you said, you have no belief whatsoever that you violated the law. That's your pleasure, but it seems to me that the sentence imposed complies with 18 United States Code 3553(a). And that'll be the order of the Court. Thank you, counsel. We're in recess.

(Recess.)

* * * *

APPENDIX C — SECOND AMENDED JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA DATED MARCH 29, 1999

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Case Number: 97-CR-159(01)(JMR)

UNITED STATES OF AMERICA

v.

STEPHEN MICHAEL GREEN

SECOND AMENDED JUDGMENT
IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

Def. Counsel: Thomas H. Shiah

The defendant was found guilty on Counts 1 after a plea of not guilty.

Title & Section	Nature of Offense	Count Number(s)
18 U.S.C. § 371	Conspiracy to Commit Wire Fraud	1
18 U.S.C. §§ 1343 and 2	Aiding and Abetting Wire Fraud	2 through 16
18 U.S.C. § 1956(H)	Conspiracy to Commit Money Laundering	17

Appendix C

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay a special assessment of $850.00, for Counts 1 through 17, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's SSN:
477-90-5896

Sentence Imposed:
February 19, 1999

Defendant's DOB:
May 20, 1964

Defendant's Mailing Address:
906 Zenith Avenue North
Robbinsdale, MN 55422

Defendant's Residence Address:
Same

s/ James H. Rosenbaum
JAMES H. ROSENBAUM
U.S. District Judge
Dated: March 29, 1999
Nunc Pro Tunc:
February 23, 1999

Appendix C

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 144 months. That time consists of 45 months to be served concurrently on Counts 1 through 5, 45 months to be served concurrently on Counts 6 through 10, said time to be served consecutively to the time served on Counts 1 through 5, and 54 months to be served concurrently on Counts 11 through 16, said time to be served consecutively to the time served on Counts 1 through 10; and 144 months on Count 17, to be served concurrently to the time served on Counts 1 through 16. Defendant shall receive credit for time served.

The court recommends a federal correctional facility or a jail-type facility in the State of Minnesota for service of sentence.

The defendant is remanded to the custody of the United States Marshal.

* * *

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years.

If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the

commencement of the term of supervised release. While on supervised release, the defendant shall comply with all federal, state, and local laws; comply with all rules and regulations of the probation office; abide by the standard conditions of supervised release as recommended by the sentencing commission; not possess any firearms or other dangerous weapons; submit to periodic drug testing and participate in substance abuse treatment and aftercare as directed by the probation office; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions: defendant shall be prohibited from incurring new credit charges or opening additional lines of credit without written approval of the probation office.

STANDARD CONDITIONS OF SUPERVISION

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

2) The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

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5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

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12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

RESTITUTION AND FORFEITURE

RESTITUTION

The defendant shall make restitution to the following persons in the following amounts:

Name of Payee	**Amount of Restitution**
The victims listed in Appendix A to the Presentence Investigation	$1,426,436.95

Payments of restitution are to be made to the Clerk of the United States District Court, for disbursement to the victims.

Restitution shall be paid forthwith. Restitution is owed jointly and severally with Thomas Green, Sr.

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If there are multiple payees, any payment not made directly to a payee shall be divided proportionately among the payees named unless otherwise specified.

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

Guideline Range Determined by the Court:

Total Offense Level:	32
Criminal History Category:	I
Imprisonment Range:	121 to 151 months.
Supervised Release Range:	2 to 3 years.
Fine Range:	$17,500 to $1,626,184.76
Restitution:	$1,426,436.95

No fine is imposed based on defendant's inability to pay.

The sentence is within the guideline range, that range does not exceed 24 months, and the sentence is imposed for the following reason(s): the defendant was involved in an extensive fraud with hundreds of victims. In recognizing the extent of the defendant's crimes, their impact, and his continued denials, the Court sentences him somewhat above the middle of the guideline range.